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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ——

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, *Petitioner*,

v.

GEORGE W. HARDEMAN, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, entered in the above-entitled case on December 22, 1969.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, which is reprinted in Appendix B, is not yet officially reported but is unofficially reported at 73 LRRM 2208, 61 LC ¶ 10,553. There was no opinion by the District Court for the Southern District of Alabama.

JURISDICTION

The judgment of the Court of Appeals was entered on December 22, 1969. On February 13, 1970, Mr. Justice Black entered an Order staying the execution and enforcement of

the judgment of the United States District Court for the Southern District of Alabama pending the timely filing and disposition of a petition for certiorari. On March 12, 1970, the time for filing a petition for certiorari was extended to and including April 6, 1970. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a federal court in a Section 102 proceeding reviewing an expulsion of a member by a union may apply a standard of review whereby the court substitutes its own factual findings and interpretations of the union's constitution and by-laws for those of the union.

2. Whether an international union may be held liable in damages in a suit brought under Section 102 merely for denying the appeal of a member expelled by a Local Lodge.

3. Whether the National Labor Relations Act, as amended, preempts an action brought under Section 102 of the Labor-Management Reporting and Disclosure Act wherein a former union member, claiming wrongful expulsion, does not seek restoration of membership rights but claims damages for an alleged loss of employment due to the union's alleged failure to refer him to employers.

4. Whether in a Section 102 suit an expelled member may elect not to seek reinstatement and thereby obtain an award of future damages.

5. Whether an award of punitive damages may be had in a proceeding under Section 102 and, if so, can malice be attributed to an international union merely for denying the appeal of a member expelled by a Local Lodge.

STATUTES INVOLVED

The pertinent portions of the Labor-Management Reporting and Disclosure Act, 73 Stat. 523, 29 U.S.C. §§ 411

et seq.—Sections 101(a)(5), 102, 29 U.S.C. §§ 411(a)(5), 412—and of the National Labor Relations Act, as amended, 49 Stat. 449, 29 U.S.C. §§ 151 *et seq.*—Sections 7, 8(b)(1)(A), 8(b)(2) and 8(a)(3), 29 U.S.C. §§ 157, 158(b)(1)(A), 158(b)(2), 158(a)(3)—are set out in Appendix A, p. 1a, *infra*.

STATEMENT OF THE CASE

On October 5, 1960, Herman H. Wise, business manager of Local Lodge 112 of the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO (hereinafter referred to as Local Lodge), left his office in the local union hall in order to go to a job site in the course of the performance of his official duties. (PX-1, p. 62)[1] George W. Hardeman, a member of the local union, who had been engaged in a dispute with Wise concerning his claim that the union was improperly failing to refer him to jobs, was in the lobby of the union hall (PX-1, pp. 29,51). When Wise reached the lobby, Hardeman handed him a telegram concerning a referral to a job, and when Wise attempted to read it, Hardeman assaulted Wise, hitting him in the face and staggering him with other blows (PX-1, pp. 29, 63-64). W. C. Bell who had left the union office with Wise attempted to stop Hardeman, and E. T. Braswell who was present told Bell not to interfere. (PX-1, pp. 29, 71, 80). Wise returned to his office and called the police[2] (PX-1, pp. 32, 84). On the following day after a hearing in a criminal

[1] The exhibits in the trial before the District Court are not contained in the record certified by the Court of Appeals but rather as one part of a two-part record separately certified by the Clerk of the District Court. Plaintiff's and defendant's exhibits are cited herein as "PX" and "DX," respectively.

[2] Later in the day the police arrived at a time when Hardeman was not present. (PX-1, p. 32.) At that time when Wise stated to the police that Braswell, who was standing there, had been present during the assault by Hardeman, Braswell hit Wise and broke his nose. (PX-1, pp. 32, 67, 85.)

court, Hardeman was fined $25 and costs of court for his conduct. (PX-1, pp. 34-35).

On October 11, 1960, Wise filed charges with the Local Lodge alleging that Hardeman's conduct constituted a violation of a provision in the Subordinate Lodge Bylaws[3] providing for punishment for any member who through the use of force or violence or the threat of the use of force or violence restrains, prevents, or attempts to restrain or prevent any official of the local lodge from properly discharging the duties of his office. The charges also alleged a violation of the Subordinate Lodge Constitution providing for expulsion upon conviction of any member who endeavors to create dissension among the members or works against the interest or harmony of any Subordinate Lodge.[4]

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[3] That provision was Article XII, Section 1 providing:

"In addition to the offenses and penalties set out in the applicable provisions of the International and Subordinate Lodge Constitution, the following offenses and penalties shall be observed in this Subordinate Lodge, and any member who violates same shall, if found guilty after proper hearing as provided herein, be punished as warranted by the offense.

"(1) It shall be a violation of these By-Laws for any member through the use of force or violence or the threat of the use of force or violence to restrain, coerce or intimidate, or attempt to restrain, coerce or intimidate any official of this International Brotherhood or Subordinate Lodge to prevent or attempt to prevent him from properly discharging the duties of his office."

[4] The constitutional provision is Article XIII, Section 1 of the Subordinate Lodge Constitution which provides:

"Any member who endeavors to create dissension among the members; or who works against the interest and harmony of the International Brotherhood or of any District or Subordinate Lodge; who advocates or encourages a division of the funds, or the dissolution of any District or Subordinate Lodge, or the separation of any District or Subordinate Lodge from the International Brotherhood; who supports or becomes a member of any dual or subversive organization which shall be hostile to the International Brotherhood or to any of its Subordinate Lodges, or which is antagonistic to the principles and purposes of the International Brotherhood, shall upon conviction thereof be punished by expulsion from the International Brotherhood."

(PX-1, pp. 2-3, 26). Copies of the charges were served upon Hardeman on October 11, 1960. A full hearing was held before a local lodge trial committee on November 12, 1960 (PX-1). At the hearing Hardeman was represented by Robert Dobson, a union member who served as his representative (PX-1, p. 3). The hearing lasted from 10:00 a.m. to 7:15 p.m. Eight witnesses testified at the hearing, and a transcript of the hearing was made which consisted of 172 pages (PX-1).

The trial committee determined that Hardeman was "guilty as charged" (PX-2). The trial committee's determination was reported to the local lodge at a regular union membership meeting on December 3, 1960 (PX-2). The trial committee's decision was sustained by a vote of the membership which voted by secret ballot to expel Hardeman from the organization "indefinitely." The vote in favor of expulsion was 59 for, 36 against (PX-2).

Hardeman appealed the membership's action to the International President who denied the appeal (PX-5). Hardeman then appealed to the International Executive Council (PX-3). After a hearing before a panel of the Executive Council (PX-4), the Executive Council denied the appeal on April 19, 1961 (PX-16).

Subsequent to his expulsion, Hardeman signed the out-of-work list maintained at the union office and was referred to a job at which he worked for five days. (R. 132, 134).[5] The union records show that he signed the out-of-work list twice and thereafter did not sign the out-of-work list (DX-3, R. 322, 329, 336). The job referral rules for employment required unemployed members and non-member applicants to report and register each month as available for employment and stated that their name would be removed from

[5] "R" herein refers to the record certified by the Court of Appeals.

the out-of-work list in the absence of such report and registration (DX-3).

On April 4, 1966,[6] more than five years after Hardeman was expelled by the local lodge, Hardeman filed a complaint in the District Court purporting to base jurisdiction on Section 102 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. 412 (R. Docket entries). The complaint, filed against the International Union only, prayed solely for damages, consequential and punitive, and did not seek reinstatement to membership (R. 1-9). The case was tried on January 16 and 17, 1969 (R. 28). At the conclusion of the trial, the District Court found as a matter of law that the expulsion was unlawful under Section 101(a)(5) of the Act stating that there was no evidence before the Trial Committee to support the charges (R. 432-433). The trial judge then charged the jury that it could find both compensatory and punitive damages (R. 433-35). The jury returned a verdict against the International Union for $152,150.00 (R. 440).

The only evidence adduced at the trial in the District Court relating to damages involved alleged loss of wages from the alleged failure of Hardeman to obtain and of the local to refer him to employment as a boilermaker during the post-expulsion period (R. 130-134, 162-164, 302-307, 321-337, 360-364, 369. 404). Hardeman testified only that, subsequent to the loss of his union card, he was "unable to work in the boilermaker's trade beyond one job lasting five days" (R. 130, 134). He also testified, however, that, during the year prior to his expulsion, he only worked five days "out of the local" (R. 145). Richard Kittrell, a witness called by Hardeman, testified that men work regularly out of the local without a union card (R. 405).

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[6] On September 12, 1963, Braswell had filed a complaint in the District Court under Section 102, and on February 16, 1966, was awarded $12,500 in damages. (See No. 1314, October Term, 1967.)

Mortality tables were introduced at the trial, and Hardeman testified that he earned from $5500 to $6000 per year prior to his expulsion from the union (R. 143, 214-15). Counsel for Hardeman argued to the jury that Hardeman's consequential damages were at least $130,231.52, which represented Hardeman's past and future loss of wages from the date of his expulsion in 1960 until his projected retirement in 1983 at age 65 (R. 410-412). A plea for punitive damages was also made (R. 413-414).

The Court of Appeals affirmed. The Court's *per curiam* opinion adopted the opinion in *International Bh'd. of Boilermakers, etc. v. Braswell*, 388 F. 2d 193 (5th Cir.),[7] as the basis for its holding describing that case as a case "arising out of the exact factual situation as that involved in the present case."

REASONS FOR GRANTING THE WRIT

I. The court below applied a standard of review inconsistent with the intent of Congress and in conflict with the standard of review applied by other circuit courts of appeals.

This case is one in which the standard of review applied by the Court does conflict with the standard of review adopted by other Circuit Courts of Appeals. This case is one in which the standard of review applied by the Court violates the intent of Congress in enacting Section 101(a)(5) and Section 102 of the Act. More important, however, this case presents the fundamental issue of the relationship of the courts to the union disciplinary process. It presents not just a technical question of the quantum of evidence required. Bluntly stated, it presents the issue of whether the courts are permitted to exercise a kind of review of workingmen's internal proceedings and determinations

[7] A copy of the Court's Opinion in *Braswell* is reprinted as Appendix C.

which imposes upon them a standard of performance they may not fairly be expected to meet. Congress has made it clear that union self-government is important to the country and to the country's labor relations. Judicial review, which demands a meticulous performance by union tribunals in carrying out disciplinary proceedings that will match the best performance of the federal trial judges, will make impossible the internal self-regulation which Congress was careful to preserve in enacting the Labor-Management Reporting and Disclosure Act and will, thus, destroy workingmen's attempts to provide their own forms of justice.

The destruction of institutions established by workmen's groups which are essential for their self-government also has adverse implications for the stability of collective bargaining relations.

Section (101)(a)(5) is procedural in nature. In *NLRB* v. *Allis-Chalmers Manufacturing Company*, 388 U.S. 175, this Court pointed out at p. 194 that:

> ". . . In 1959 Congress did seek to protect union members in their relationship to the union by adopting measures to insure the provision of democratic processes in the conduct of union affairs and procedural due process to members subject to discipline. Even then, some Senators emphasized that 'in establishing and enforcing statutory standards great care should be taken not to undermine union self-government or weaken unions in their role as collective bargaining agents.' S. Rep. No. 187, 86th Cong., 1st Sess., 7. . . . Indeed that Congress expressly recognized that a union member may be 'fined, suspended, expelled, or otherwise disciplined, and enacted only procedural requirements to be observed.'"

Most of the cases which have arisen in the federal courts involving the review of union disciplinary proceedings in suits brought under Section 102 of the Act have held that judicial inquiry into alleged violations of Section 101(a)(5)

is governed by a standard of review which confines the reviewing court to the narrow area of determining whether there is *some evidence* to support the charges made. *Lewis v. American Federation of State, County and Municipal Employees,* 407 F. 2d 1185 (3rd Cir.); *Vars v. Int'l. Bh'd. of Boilermarkers,* 320 F. 2d 576 (2nd Cir.); *Burke v. Intl'l. Bh'd. of Boilermarkers,* 302 F. Supp. 1345, aff'd. *per curiam,* 417 F. 2d 1063 (9th Cir.); *Rosen v. Painters Dist. Council 9,* 198 F. Supp. 46 (S.D. N.Y.), appeal dismissed, 326 F. 2d 400 (2nd Cir.); *Phillips v. Teamsters Local 560,* 209 F. Supp. 768 (D. N.J.)

The court below applied a wholly different standard of review. The court's opinion incorporated by reference as the basis for its holding *International Brotherhood of Boilermakers* v. *Braswell,* 388 F. 2d 193 (5th Cir.), cert den. 391 U.S. 935.[8] That case adopted the "some evidence" rule. In the instant case the court, in fact, did not follow that rule, and substituted its own findings for those of the union membership as well as substituted its own interpretation of the union's Constitution and By-laws for the union's interpretation.

We can only ascertain the standard applied in Hardeman by analysis of what the court below in fact did. At the outset, the court below fell into a threshold error of mistaking the factual situation in *Hardeman* as identical with the factual situation in *Braswell.* In *Hardeman* the short of the matter is that Hardeman struck the Local Lodge Business Agent Wise because of a dispute over Wise's alleged failure to refer Hardeman to work on particular construction jobs to which Hardeman believed he had a right of referral. Job referrals were clearly a function within the scope of the business agent's duties. Braswell, on the other hand, was not involved in any dispute over job referral and hit the

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[8] Questions 2 through 4 were not presented to this Court in the petition for certiorari in *Braswell.* Question 1 was presented in a different aspect from that presented here.

same Business Agent Wise because, subsequent to Hardeman's assault on Wise, the police were called, and Wise, in Braswell's presence, pointed to Braswell as having been present during the affair initiated by Hardeman. Hardeman was not present at the time of this occurrence. Thus, this case did not grow out of the "exact factual situation" as did *Braswell*. Braswell may have struck Wise in a fit of personal anger at being pointed out to the police by Wise.[9] Hardeman's attack upon the business agent had an entirely different motivation, namely, to force Wise to give him a job referral. Hardeman played the primary role in the incident which he initiated, and his conduct is not to be equated with that of Braswell. Here, the facts narrated in the Statement of Facts, *supra*, are based upon probative evidence contained in the transcript of the hearing before the union trial committee.[10] In short, probative evidence before the union showed that Hardeman beat up the business agent because he was not satisfied with the job referral system as operated by the union. Since there was at the very least adequate probative evidence to support the findings of the trial committee and the union membership, it is clear that the Court of Appeals weighed the evidence before the trial committee and reached a contrary result.

Clearly, a physical assault upon a business agent because of a dispute over job referrals constitutes a violent restraint or an attempt to restrain a union officer in the performance of his duties and thereby violates Article XII, Section 1 of the Local Lodge's By-Laws. Moreover, violence provokes dissension [11] and works against the interests

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[9] Such was the Fifth Circuit's independent finding of fact in *Braswell*.

[10] The references to those portions of that transcript which contain the principal evidence which supports the union's findings are paginated in the Statement of Facts.

[11] The National Commission on the Causes and Prevention of Violence has pointed out that both group and individual violence has had a divisive effect, jeopardizing precious institutions such as

and harmony of the Subordinate Lodge. Thus, all five members who were present at the altercation immediately became involved on opposite sides in Hardeman's dispute with Wise. It is reasonable to infer that the assault on the principal officer of the local union in connection with the performance of his official duties would tend to polarize sentiment and attitudes within the local. The union's determination that there was "dissension" in its view of the term created by Hardeman's attack is supported by the facts.

The result reached in this case by the court below in substituting its own judgment for that of the union is at war with the intent of Congress as to the role of the federal courts in reviewing union disciplinary proceedings under Section 101(a)(5). Congress did not intend that the courts engage in a full scale review of the internal law of the union or the facts. *Lewis v. American Federation of State, County and Municipal Employees, supra.*

The reasoning of this Court in the *Steelworkers Trilogy* [12] applies here. Judicial restraint is essential, for courts are not equipped with experience or expertise in the internal

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schools and universities "poisoning the spirit of trust and cooperation that is essential to their proper functioning" and "corroding the central political processes of our democratic society—substituting force and fear for argument and accommodation." *Final Report of the National Commission on the Causes and Prevention of Violence*, page xv (1969). Similarly, the use of violence in the form of a physical attack upon a union official has divisive effects among union memberships and encourages the use of force to effectuate changes in the administration of the tasks of a labor union in lieu of resort to the established peaceful internal processes of filing and processing charges of maladministration on the part of the union or filing claims with the contractually established joint referral committees whose function is to police the referral system.

[12] *United Steelworkers v. Warrior & Gulf Navig. Co.*, 363 U.S. 574; *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564; *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593. See *Lewis, supra*, at 1193.

operation of unions. The unions, too, have their own jargon, and their own understanding of the concepts that their internal "laws" comprehend. As the Second Circuit stated in *Vars, supra,* and the Third Circuit in *Lewis, supra,* the courts are not to weigh the credibility of witnesses or to evaluate the quantum of evidence adduced at union hearings. Federal court review must obviously be limited to such inspection of the union proceedings as will enable the court to determine that procedural fairplay was had. For the reasons stated above, the standard applied by the court below is in conflict with the views of the Second and Third Circuits and by the Ninth Circuit in its affirmance of the District Court in *Burke v. Boilermakers, supra.*

The mood of Congress was expressed in this legislation. Congress clearly intended that Section 101(a)(5) be procedural only. The "some evidence" rule, if it can be justified at all, can only be justified as a way of assuring procedural due process. For if there were no evidence at all, there would not be a full and fair hearing. Congress made it clear, however, that it did not intend to substitute the courts for the unions in determining when the unions should administer discipline in a particular case. Thus, even the original Bill of Rights as embodied in the McClellan Amendment in the Senate was limited to guaranteeing specifically enumerated procedures surrounding the disciplinary hearings and did not allow courts to review *de novo* the union proceedings. That amendment provided for final review on a written transcript of the hearing by an impartial person, but the McClellan Amendment itself was attacked on the ground that the procedural requirements were unduly burdensome and needlessly onerous in the context of union affairs. *Leg. Hist. of the LMRDA* (Dept. of Labor) at 250, 290, 260-261, 271, 287. The Kuchel substitute, a weaker provision on union discipline, which is now Section 101(a)(5) of the Act, was approved to replace the McClellan Amendment.

The changes made by the Kuchel substitute in 101(a)(5), including elimination of the requirement for a written transcript, have significance with reference to the standard of review intended by Congress. Senator McClellan himself emphasized that the standards provided by the Bill of Rights as found in the Kuchel substitute were minimum standards. *I Leg. Hist. of the LMRDA* (NLRB) at 1294. He stated that "the real issue now in this proposed labor reform legislation" was corruption, racketeering and exploitation by dishonest and criminal union officers tending to subvert the right of union membership "to manage and control their internal union affairs by recognized and respected democratic process" *I Leg. Hist. of LMRDA* (NLRB) at 1295.

As legislation, the mood of Congress must be respected. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 487. In *Universal Camera* this Court made it clear that the court has an important function in insuring that the intent of Congress with regard to the scope of review is honored. There comes a time when the court must turn its attention to the exercise of the role of the judiciary in regard to the reviewing function entrusted to the courts by Congress. This Court felt that time had come with regard to the examination of the role of the judiciary under Taft-Hartley, approximately four years after the statute was enacted. The Labor-Management Reporting and Disclosure Act has now been law for more than ten years. Where, as here, the federal courts are showing a tendency to supplant the unions in the administration of discipline of union members and to pave the way for excessive damages awarded by juries, there is an invitation to litigation designed not to restore membership rights, but to seek windfalls. Such results show that the time has come for this Court to examine the reviewing function of the federal judiciary under Section 102.

II. An international union may not be held liable for damages in a suit brought under section 102 alleging wrongful expulsion where its only connection with such explusion by the local lodge was the performance of its function as an appellate body in reviewing the action taken by the local lodge.

The Fifth Circuit's opinion in this case deals with important statutory and policy considerations growing out of the application of Section 102 to an International's performance of its appellate function. Particularly, since this Court has not had occasion to address itself to that subject since the enactment of the Labor-Management Reporting and Disclosure Act, there are compelling reasons why the Court should address itself to this question.

This case presents the question whether an international union may be held liable in damages in a suit under Section 102 of Landrum-Griffin where its sole connection with the expulsion of respondent Hardeman by the Local Lodge was its action as an appellate body reviewing the Local Lodge's proceedings.[13] In that regard, the decision below is in conflict with several decisions of the highest court of the State of New York and presents a question of major importance in the administration of the Act.

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[13] Goodlin, an International officer, was present at the hearing before the Trial Committee to offer technical assistance (PX-1, p. 6). There was no charge that this was improper. Indeed, immediately prior to the conclusion of the plaintiff's case in the trial court, the plaintiff was permitted to amend paragraph 4 of the complaint in all counts to conform the complaint to the proof by striking out the allegation that the Trial Board was selected by the defendant International Union and to add an allegation that the plaintiff Hardeman's final appeal was denied by the defendant on or about April 1961 (R. 215-217). That is the date upon which the International Executive Board denied Hardeman's appeal (PX-16). Thus, the only specific allegation of wrongdoing on the part of the International is the Executive Board's denial of plaintiff's appeal.

The New York Court of Appeals has long held that absent a showing of fraud or bad faith, an international union may not be held liable for damages in a suit brought by an expelled member merely because it acted as an appellate tribunal. This is true even if the decision of the international on appeal is erroneous. *Schouten* v. *Alpine,* 215 N.Y. 225, 109 N.E. 244; *People ex rel. Solomon* v. *Brotherhood of Painters, etc.,* 218 N.Y. 115, 112, N.E. 752. See also *Madden* v. *Atkins,* 4 N.Y. 2d 283, 115 N.E. 2d 73.[14] In *Solomon,* the Court stated as follows with respect to the liability of the International:

> ". . . It acted as an appellate body to review the order of expulsion which was entered against the relator by the district council. Its only action in the case was the exercise of its function to hear the appeal and review the action of the local body . . . [It] could not be held liable in damages as to the relator because it affirmed the order of expulsion in the absence of fraud or bad faith." 112 N.E. at 754.

As indicated in the decision of the Court of Appeals for the Fifth Circuit in *Braswell,* the decisions of the New York courts are entitled to special weight because of their expertise in the application of the common law to internal union affairs.

International union appellate review procedures serve as a protection to the individual member. Professor Taft's study of union constitutions and appeal cases led him to the conclusion that:

> "It is obvious that the appellate machinery offers real protection in most unions, and that central organizations do not freely allow unreasonable penalties or unwarranted convictions." Philip Taft, *The Structure and Government of Labor Unions* (Harvard University Press, 1954), at p. 180.

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[14] *Contra, Int'l Printing Pressmen Union* v. *Smith,* 189 S.W. 2d 729.

As an illustration of this point, Professor Taft cited the experience in the Carpenters Union where, during an eleven month period in 1952, there were 39 appeals from local union decisions to the International President involving fines. Of these cases 11 or 28.2% were reversed and the verdict in 7 or 15.4% of the cases was upheld but the penalty reduced (*Id.*, p. 143). There is no indication from the language of the statute (see Sections 101(a)(5) and 102) that the union appellate procedures were the evil at which the law was aimed.

The present scope and availability of appellate review procedures in the internal proceedings of labor unions are reflected by a 1963 Bureau of Labor Statistics study of 156 national and international constitutions which showed that 153 provided for appellate review of at least some trial decisions, and 142 for review of all local trial decisions. Bureau of Labor Statistics, U.S. Department of Labor "Disciplinary Powers and Procedures in Union Constitutions" (Bull. No. 1350, 1963), pp. 107-110. Another study of internal union structure states, "it is not unusual for an international union to handle 100 appeals a year, and the average appears to be above that number. Each year there is likely to be several thousand appeals by union members involving disciplinary issues . . ." Taft, *supra*, at p. 124.

It is respectfully submitted that the Congress did not intend to impose heavy pecuniary liability on international unions because their opinions on appeals from local union decisions are not sustained by the Federal courts. The relationship between a local union and an international union stems normally, as in the instant case, from a federated system. The International's role as an appellate body is analogous to that of an appellate court in reviewing the decisions of the trial court. An erroneous decision of a federal appellate court does not make either the court or the Federal Government liable for that error. *Bradley* v. *Fischer*, 13 Wall 335; *Barr* v. *Matteo*, 360 U.S. 564, 569. An erroneous decision of an arbitrator does not make him liable

in a civil suit. *Cahn* v. *International Ladies' Garment Workers' Union*, 311 F. 2d 113 (3rd Cir.). To hold an international union liable solely for exercising its traditional appellate functions is shocking. Moreover, such a result is incompatible with the Congressional purpose of preserving the principles and procedures of union self-regulation to the maximum extent possible. If international unions are to be subjected to large damage awards where in good faith the appellate tribunal upholds what a court later determines to be an erroneous action of a local union, international unions are likely to cease furnishing appellate tribunals and, thus, to weaken the processes of union self-government.

III. The decision below is in conflict with the preemption principles clearly established in the decisions of this court, in particular Borden, Perko and Garmon.

This case raises the important question whether a suit against a union brought under Section 102 which does not seek restoration of membership but which seeks not only past damages but also future damages for an alleged loss of employment alleged to be attributable to a union's failure to refer the plaintiff to employers through the union's hiring hall is preempted by the National Labor Relations Act. *Local 100, United Association of Journeymen and Apprentices* v. *Borden*, 373 U.S. 690; *Local 207, International Ass'n. Bridgeworkers, etc.* v. *Perko*, 373 U.S. 701; *San Diego Buildings Trades* v. *Garmon*, 359 U.S. 236. This case preemption-wise is similar to *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America* v. *Lockridge*, No. 1072 in which, on March 30, 1970, this Court granted certiorari.

The so-called "Bill of Rights", of which Section 101(a)(5) is a part, refers to rights of membership. The Labor-Management Reporting and Disclosure Act deals with the

relationship between a member and his union, not with a member's employment relations. The conduct alleged to have been engaged in by the union in this case, which was his real concern, was a refusal by the local union to refer Hardeman, the respondent, to jobs. Hardeman claimed that the union's refusal to refer resulted in his inability to obtain employment. It was that conduct for which damages were sought. Such conduct is arguably subject to the prohibitions of Sections 8(b)(2) and 8(b)(A) of the National Labor Relations Act or is arguably protected by Section 7 of that Act.[15] This is the type of conduct which was the subject matter of the lawsuit in *Local 100* v. *Borden*, *supra*, where this Court held that such conduct was arguably prohibited or protected by the National Labor Relations Act.

Suits brought under Section 102 to enforce the Bill of Rights are suits to enforce a Federal statutory right. To the extent that a suit brought under Section 102 deals with membership rights, such a suit is not preempted by the National Labor Relations Act. Thus, in a suit which seeks reinstatement to membership for a wrongful expulsion or suspension, there is no preemption of the National Labor Relations Act. In such a suit collateral relief in the form of consequential damages up to the date of restoration of membership or an offer to restore membership may be awarded. Reinstatement to membership, the statutory right comprehended by Congress, is not the aim of this suit. This Congressional objective is not pursued and the subject matter of the suit simply does not come within the ambit of the Bill of Rights. Hence, where, as here, the suit involved focuses "principally, if not entirely, on the union's actions with respect to Borden's [Hardeman's] efforts to obtain

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[15] Indeed, if the facts were as alleged by respondent, which we do not concede, the conduct clearly is prohibited by Sections 8(b)(2) and 8(b)(1)(A) of the National Labor Relations Act and subject to the jurisdiction of the National Labor Relations Board. *Lummus Company* v. *NLRB*, 339 F. 2d 728 (D.C. Cir.).

employment the National Labor Relations Act preempts."[16] Here, as in *Borden*, "no specific equitable relief is sought directed to Borden's [Hardeman's] status in the union" and, thus, there is no Federal remedy " ' to fill out' by permitting the award of consequential damages." *Borden, supra*, at p. 697. The "crux" of the action here concerns Hardeman's employment relations and involves conduct arguably subject to the National Labor Relations Board's jurisdiction. *Borden* involved state court litigation. The preemption doctrine applies to Federal courts as well as state courts. *Vaca* v. *Sipes*, 386 U.S. 171, 179. The result reached by the Fifth Circuit, therefore, is in conflict with the decisions of this Court and, in particular, with this Court's decision in *Borden*.

IV. Congress did not intend its authorization in section 102 for "relief (including injunctions) as may be appropriate" to permit an award for future damages to an expelled member merely because he elects not to seek reinstatement.

The award of future damages in the circumstances of this case raises an important issue of first impression in the construction and application of the Labor-Management Reporting and Disclosure Act significant in the administration of that statute.

In this case Hardeman filed his suit five years after his expulsion and has never sought reinstatement in the Union.[17] Nevertheless, he sought compensatory damages allegedly resulting from the loss of his union membership for a period of 23 years, computed from the date of his expulsion in 1960 until 1983, when he would reach the retirement

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[16] 373 U.S. at 697.

[17] The trial court precluded the introduction of evidence showing that Bullock, one of the participants in the incident in which Hardeman was involved and who was likewise expelled, was reinstated to membership (R. 39-40).

age of 65 (R. 410-412). The District Court did not correct this patently erroneous standard. Rather, the District Court directed the jury to award compensatory damages to cover wages lost "in the future" (R. 433), permitting a compensatory award uncertain in amount but of approximately $130,000.[18] The petitioner objected to this instruction and raised the general issue of damages before the Court of Appeals. That Court did not disturb the damage award of approximately $152,000, including punitive damages, and did not permit petitioner the opportunity for oral argument.

We call to the Court's attention that the sum of $152,000 with simple interest at only 7 per cent per cent per year would yield Hardeman an annual income of $10,640 for life, substantially more than he had earned prior to his expulsion. And, he would still retain his capital amount of $152,000. Even if legal costs reduce his recovery by one-third, his annual income on the basis of the above calculation would be in the neighborhood of $7,000 with full retention of the capital amount. He would receive such a windfall simply because he chose not to seek to regain his union membership which he claimed was necessary to return to work as a boilermaker.

Thus, there is presented the important question as to whether a litigant may convert a claim for compensatory damages by loss of wages into a claim for a lifetime annuity by electing not to seek reinstatement. The decision of the court below in allowing such a remarkable conversion is in conflict with elementary principles of mitigation of damages universally applied by the courts and conflicts in principle with the decision of the Seventh Circuit in a case arising under the National Labor Relations Act where the employee did not desire reinstatement. *Vapor Blast Shop Workers* v. *Simon*, 305 F. 2d 717, n. 4 (7th Cir). See also,

[18] Counsel for Hardeman in his summation to the jury used a figure of $130,231.52 (R. 412).

NLRB v. *Seven-Up Bottling Co. of Miami, Inc.*, 344 U.S. 344, 346.

This Court has demonstrated its concern in a variety of contexts that damage awards against unions be drawn with great caution and precision. *Linn* v. *United Plant Guard Workers*, 383 U.S. 53 (common law actions for libel); *Vaca* v. *Sipes*, 386 U.S. 171 (fair representation); *Teamsters Local 20* v. *Morton*, 377 U.S. 252 (suits under Section 303 of the Labor-Management Relations Act, 29 U.S.C. § 187).

Congress in enacting Title I did not intend to place in jeopardy the financial status of the unions as institutions by subjecting them to runaway damage awards in the nature of annuities where a member elects not to seek reinstatement. This Court, recognizing "the propensity of juries to award excessive damages" (*Linn* v. *United Plant Guard Workers, supra*, 383 U.S. at 64, 65) has recognized the importance of not allowing damage remedies to defeat the "needs of national labor policy," 383 U.S. 67. In enacting the Bill of Rights, Congress intended "to create limits on the exercise of union authority without vitiating a labor organization's essential strength."[19] The decisions below clearly overstep these limits.

V. Punitive damages are not available in suits against unions under section 102 for violation of membership rights under section 101(a)(5).

The question as to whether punitive damages are available in an action under Section 102 is an important statutory issue as to which lower federal courts are in conflict.

The general rule is that in federal statutory causes of action punitive damages are not available unless expressly provided for by Congress. Congress has demonstrated that

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[19] Christensen, *Union Discipline under Federal Law: Institutional Dilemmas in an Industrial Democracy*, 43 NYU L. Rev. 227, 278 (1968).

it knows how to provide for a punitive damage remedy and has clearly demonstrated its intention when it chooses to permit such a remedy. *United Mine Workers* v. *Patton*, 211 F. 2d 742, 749 (4th Cir.) cert. denied 348 U.S. 824, 17 U.S.C., Section 1 (copyright); 35 U.S.C., Section 67 (patent); 15 U.S.C., Section 15 (anti-trust). This rule has special relevance with regard to labor legislation. *Republic Steel Corp.* v. *NLRB*, 311 U.S. 7, 10-13; see *General Committee* v. *M.K.T.R.Co.*, 320 U.S. 323, 332-333. This Court in *Teamsters* v. *Morton*, 377 U.S. 252, held that punitive damages were not available under Section 303 of Taft-Hartley. With regard to the issue of punitive damages under Section 301, the Court of Appeals for the 3rd Circuit, dividing 5-3, held that punitive damages may not be awarded under that Section. *United Shoe Workers v. Brooks Shoe Mfg. Co.*, 298 F. 2d 277 (3rd Cir.).

While courts of appeals other than the Fifth Circuit have not ruled expressly on punitive damages in suits under Section 101(a)(5) of the Labor-Management Reporting and Disclosure Act, to award damages thereunder presents a conflict in principle with regard to the application of punitive damages under the national labor policy. Compare *United Shoe Workers v. Brooks Shoe Mfg. Co., supra,* with *International Brotherhood of Boilermakers v. Braswell, supra.* Curiously, the Fifth Circuit itself is confused about punitive damages under Section 101(a)(5). Thus, in *Fulton Lodge No. 2 of International Association of Machinists v. Nix*, 415 F. 2d 212, at n. 23 (5th Cir., 1969), a panel of that court held that punitive damages do not lie, citing *Braswell!*

Two Courts of Appeals have held other remedies unavailable in a fashion which would make the unavailability of punitive damages as a remedy an *a fortiori* proposition. *Boilermakers* v. *Rafferty*, 348 F. 2d 307, 315 (9th Cir.) holding damages for emotional distress impermissible under Section 102; *McCraw* v. *United Association*, 341 F. 2d 705, 710 (6th Cir.), affirming 216 F. Supp. 655, 662, 664 (E.D.

Tenn.) holding the allowance of attorneys' fees not authorized under Section 102.[20]

Several other courts have said that punitive damages are not recoverable. *Magelssen* v. *Plasterers' Local 518*, 240 F. Supp. 259 (W.D. Mo.) (alternative holding); *Cole* v. *Hall*, 35 F.R.D. 4 (E.D. N.Y.), *aff'd.* 339 F. 2d 881 (2d Cir.); *Burris* v. *International Bhd. of Teamsters*, 224 F. Supp. 277 (W.D. N.C.). Other courts have awarded punitive damages on a showing of malice and willfulness. *Farowitz* v. *Musicians Local 802*, 241 F. Supp. 895 (S.D. N.Y.). The Labor-Management Reporting and Disclosure Act was enacted by Congress as part of a closely integrated statutory scheme for labor-management regulation; and no construction of any of the statutes which form that policy can properly be made without considering the entire statutory structure. The provisions of the National Labor Relations Act, the Railway Labor Act and the Labor-Management Relations Act, 1947, as amended, do not comprehend awards of punitive damages. It is, therefore, unlikely that Congress in enacting Section 101(a)(5) intended to provide a punitive damage remedy.

The legislative history is relatively sparse on the issue of remedies under Section 102. Such history as there is confirms the conclusion that Congress intended to limit damages against unions to those which are compensatory in nature. For example, the Kennedy-Ervin Bill, as it passed the Senate subsequent to the adoption of the Kuchel substi-

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[20] *McCraw* held that in actions under Sections 101(a) and 102 of the Act damages are to be limited "to those which directly and proximately resulted from the alleged violation of the Act. . . ." *Ibid.* See also *Keenan v. Metropolitan District* Council, 266 F. Supp. 497 (E.D. Pa.) holding damages for mental anguish and loss of reputation not allowable.

tute, contained a specific criminal provision making it unlawful for a "labor organization, its officers, agents, representatives, or employees, to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provision of this Act" (Section 607 of S.1555, I Legislative History of LMRDA at 575-576). The Landrum-Griffin bill deleted the criminal penalty and substituted civil enforcement. Congressman Griffin stated that ". . . the conduct prohibited by this section is generally comparable to conduct described as an unfair labor practice under the Taft-Hartley Act and, accordingly, we do not believe that criminal sanctions are warranted," II Legislative History of LMRDA 1522 (1). The analogy to Taft-Hartley unfair labor practices reinforces the conclusion that the civil relief sections of Landrum-Griffin were not intended to encompass punitive damages.

In any event, the record in this case provides no basis for a finding of malice and certainly not as to the International Union's exercise of its appellate function. Actually, all that was claimed by the plaintiff as to the actions of the International Union was that". . . his final appeals were denied by Defendant on or about April 1961 . . ." (R. 216).

Finally, it should be noted that Section 102 provides for civil actions in connection with the infringement of rights in Sections 101(a)(1) "Equal Rights," 101(a)(2) "Freedom of Speech and Assembly," 101(a)(3) "Dues, Initiation Fees, and Assessments," 101(a)(4) "Protection of the Right Agreements," in addition to Section 101(a)(5) "Safeguards against Improper Disciplinary Action" which is involved in this case. The variety of rights which come within the scope of Section 102 explains the general language in that section authorizing civil actions "in a District Court of the United States for such relief (including injunctions) as may be appropriate." It is respectfully submitted that, in using the quoted language, Congress did not intend pecuniary recov-

eries from union treasuries for violations of Section 101(a)(5) which exceed the traditional remedies provided by other Federal statutory labor policy (such as in the National Labor Relations Act) against employers for unlawful discharges of employees, i.e. reinstatement and backpay. It is also most doubtful that Congress intended to provide for astronomical pecuniary recoveries (including lifetime annuities and punitive damages), the hazards of which would tend to "chill" the proper utilization of union disciplinary procedures—at times, the only effective means of discharging union responsibilities to deal with illegal wildcat strikes by groups of employees.

VI. Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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